No. 33908

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TERRA FIRMA COMPANY, a West Virginia company and a wholly-owned subsidiary of CONSOL ENERGY, INC., a Delaware corporation,

Appellees,

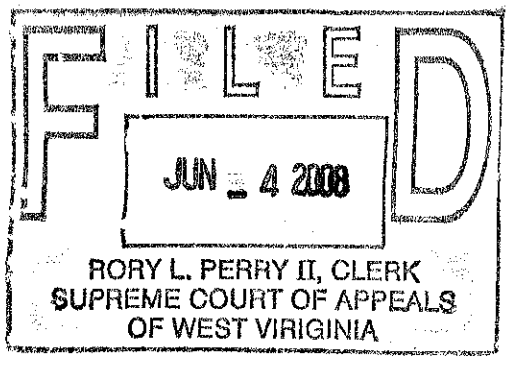
V.

FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WV (Civil Action No. 06-C-13)

ROBERT MORGAN and VICKIE MORGAN, husband and wife,

Appellants.

BRIEF FOR APPELLEES



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KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This case comes before the Court on appeal from a June 15, 2007, Order of the Circuit Court of Monongalia County granting Appellee Terra Firma Company's ("Terra Firma") Motion for Summary Judgment and dismissing, with prejudice, Appellants Robert and Vicki Morgan's ("Morgans") claim for reformation of the purchase price paid to them for their property located in Monongalia County, West Virginia.

To prevail on their claim for reformation of the price term contained in the parties' Purchase Agreement and subsequent deed of conveyance, the Morgans must be able to prove by clear and convincing evidence the existence of a mistake on their part, and fraud or inequitable conduct by Terra Firma. As explained by the Circuit Court, there are no issues of material fact with respect to the existence of a unilateral mistake by the Morgans, as the simple mistake or ignorance of fact at issue does not rise to the level of mistake contemplated by the element of mistake set forth in *Lusher v. Sparks*, 122 S.E.2d 609, 615 (W. Va. 1961). Moreover, the lower court found that there are no issues of material fact with respect to the existence of fraud, misrepresentation, or inequitable conduct by Terra Firma, as the Morgans have failed to produce evidence sufficient to allow a reasonable jury to find the elements of *Kidd v. Mull*, 595 S.E.2d 308 (W.Va. 2004) satisfied and return a verdict in their favor. Therefore, as a matter of law, the lower court granted Terra Firma's motion for summary judgment.

For reasons set forth below, Terra Firma respectfully requests that this Court deny the Morgans' request that this case be remanded for trial and affirm the decision of the Honorable Robert B. Stone, Judge of the Circuit Court of Monongalia County, West Virginia.

ERRORS AND OMISSIONS IN APPELLANTS' STATEMENT OF FACTS

This case centers around the purchase of the Morgans' property in western Monongalia County, West Virginia, by Terra Firma. The Morgans unilaterally listed this property and fully negotiated its sale. Throughout the transaction the Morgans were represented by their agent, Nancy Kincaid, a Realtor with J. S. Walker and Associates, and also retained the benefit of counsel. Similarly, Terra Firma worked through its agent, William Burton, an independent real estate broker. On November 3, 2004, after a series of negotiations, the parties reached an agreement through their respective agents. This understanding culminated in the execution of a valid and enforceable contract, entitled the "Real Estate Purchase Agreement". The Morgans, now dissatisfied with the purchase price, attempt to disturb the contract by asserting that Terra Firma improperly withheld certain information from them. The Circuit Court rejected this argument, holding that Terra Firma breached no duty in withholding privileged information from the Morgans prior to the sale, and dismissed their claim as an inappropriate attempt to employ the court system as a vehicle to renegotiate an enforceable contract with the sole objective of obtaining a higher price.

Summary of Undisputed Facts

The Decision to Sell the Subject Property

In 1996, the Morgans purchased a 147 acre farm near Burton, West Virginia, (hereinafter the "Subject Property") for $185,000.00. Less than ten years after purchasing their home, the Morgans contacted J. S. Walker & Associates (hereinafter "J. S. Walker") in September of 2004 to inquire about listing the Subject Property and/or their convenience store, located in Hundred, West Virginia. (R. Morgan Depo., p. 29, l. 16-20). The Morgans were

motivated to sell their farm and convenience store by Mrs. Morgan's desire to "get rid" of the business and relocate to the mountains near Petersburg, West Virginia. (V. Morgan Depo., p. 2, l. 14; p. 3, l. 12-13).

Nancy Kincaid, a real estate agent with J. S. Walker, received the call from the Morgans. (*Id.* at p. 9, l. 12-17). She and Bob Beach[1], another J. S. Walker agent, met the Morgans at their convenience store and at their farm. (Kincaid Depo, p. 111, l. 23-24; R. Morgan Depo, p. 36, l. 11-22). The Morgans listed both properties with J. S. Walker, who subsequently entered it into the Multi-List Service for North-Central West Virginia (hereinafter "MLS"). (Kincaid Depo, p. 10, l. 12; p. 12, l. 7-11). The original list price for the farm was $640,000.00. (R. Morgan Depo, p. 52, l. 8). The Morgans established this price after their realtors presented historical sales data from the surrounding area. (Kincaid Depo, p. 8, l. 11-16). Although Mr. Morgan at one time expressed an interest in selling the Subject Property for $1,000,000.00, he was content with listing it for $640,000.00. (Morgan Depo, p. 53, l. 3-24, p. 54, l. 3-5).

In 2004, Terra Firma retained the services of William H. Burton, Jr., a licensed real estate agent, to act as a buying agent. (Burton Depo., p. 7, l. 22-24; p. 8, l. 1-6[2]). Mr. Burton was specifically charged with negotiating the purchases of various real properties in the western part of Monongalia County. The only contact Mr. Burton had with Terra Firma prior to closing was through James Russell, Esq., acting as president of Terra Firma. (*Id.* at p. 8, l. 9).

[1] In their brief, the Morgans allude to possible wrongful conduct by and between Mr. Beach and Terra Firma and/or Consol Energy, Inc based on Mr. Beach's status as a political figure in Monongalia County and the West Virginia state legislature. (*See* Appellant Brief, p. 3) Any notion that Terra Firma, its agents, or parent company engaged in some form of conspiracy to acquire the Subject Property, unilaterally listed by the Morgans, is wholly without merit and should not be countenanced by this Court.

[2] All deposition transcripts are attached to Terra Firma's "Motion for Summary Judgment" as Exhibit B.

Mr. Russell never informed Mr. Burton of Terra Firma's intent with the properties that Mr. Burton was purchasing. (*Id.* at p. 8, l. 15-18).

On September 29, 2004, Mr. Burton searched the MLS system and discovered that the Morgans' Subject Property was listed for sale. (Burton Depo, p. 13, l. 17-21). On October 8, 2004, he forwarded a purchase contract to Nancy Kincaid, offering $480,000.00 to purchase the Subject Property. (*Id.* at p. 13, 1. 22; p. 15, 1. 2-3). The Morgans rejected this offer without coming off their original demand of $640,000.00. (*Id.* at p. 14, 1. 22-23). In response, Mr. Burton forwarded a second contract to Ms. Kincaid, offering $500,000.00 for the Subject Property. (*Id.* at p. 16, 1. 22-23). Again, the Morgans rejected this offer without coming off their original demand of $640,000.00. (*Id.* at p. 17, 1. 1-6).

The Emergence of a Valid Contract After Negotiating Desired Terms

On November 1, 2004, Burton forwarded a third offer to Ms. Kincaid, offering to purchase the Subject Property for $525,000.00. (*Id.* at p. 17, 1. 10-16). According to the Morgans, they agreed to this price because Ms. Kincaid convinced them that it was a good deal. (R. Morgan Depo, p. 75, l. 1-4). After agreeing to the price, the Morgans then negotiated several additional matters through Ms. Kincaid. For example, the Morgans requested the right to lease the property following the closing. (Burton Depo, p. 17, l. 11-15). The Morgans also negotiated additional earnest money (*Id.* at p. 19, l. 8-0), and altered several dates contained in the written offer, such as the timing for inspections and appraisals. (*Id.* at p. 19, l. 23-24; p. 20, l. 2-3). The Morgans also tried to secure hunting rights on the Subject Property, to which Terra Firma did not consent. (*Id.* at p. 77, l. 13-20).

According to Mr. Morgan, the three "important things" discussed during negotiations included the leaseback provision, hunting rights, and the purchase price. (*Id.* at p. 78, l. 7-14). At no time did the Morgans inquire about Terra Firma's corporate structure or its intended use of the property. Additionally, the Morgans likely understood Terra Firma's intent with the property. According to Nancy Kincaid,

> [Morgan] thought Terra Firma was buying the property for coal reasons, but didn't know for what. [Morgan] told me he thought they [Terra Firma] may be putting a coal conveyor belt through the area. *That is why he held out for the price he wanted.*

(Kincaid Depo., p. 54, l. 20-24) (emphasis added).

Terra Firma and the Morgans reduced the agreement to writing[3]. According to Mr. Morgan, this agreement contained all of the negotiated and agreed upon terms between the Morgans and Terra Firma. (R. Morgan Depo, p. 88, l. 2-7). The agreement contained no restriction or contingency affecting the use of the property. When the Morgans executed the purchase agreement, the property had been listed for approximately two months on the MLS system. (Kincaid Depo. p. 47, l. 16). The Morgans never told J.S. Walker that they were not interested in selling their property, or that any deed restrictions should be placed on the property to a particular party or entity. (*Id.* at p. 66, l. 7-14; p. 18, l. 10-15).

Throughout the transaction, the Morgans retained the benefit of counsel. For example, on November 2, 2004, the day after receiving Terra Firma's third offer of $525,000.00, Ms. Kincaid faxed the contract to the Morgans' attorney, Kevin Neiswonger at their request. (Order ¶ 9, p. 7). Additionally, prior to the closing, the Morgans had another attorney, Greg

[3] The Real Estate Purchase Agreement is attached to Terra Firma's "Motion for Summary Judgment" as Exhibit C.

Knoll, review the closing documents, including the deed from the Morgans to Terra Firma. (R. Morgan Depo, p. 89, l. 2-12). The Morgans signed the Real Estate Purchase Agreement without objecting to a provision identifying the grantee as "contact purchasers attorney". (Order ¶19, p. 8). Had it chosen to do so, this provision would have allowed Terra Firma to title the property in any name that it wanted. Terra Firma and the Morgans closed the real estate transaction on December 14, 2004. The deed[4] transferring the property to Terra Firma contained no covenants or restrictions on the land's use.

Miscommunication Between the Morgans and Their Agent

According to Mr. Morgan, **their** realtor never fully explained the identity of the individual with whom she was negotiating. (R. Morgan Depo, p. 73, l. 15-16). For instance, Mr. Morgan at one point believed that Mr. Burton was Ms. Kincaid's boss, rather than Terra Firma's realtor. (R. Morgan Depo, p. 59, l. 22-23). Mr. Morgan even acknowledged during his deposition that he had "no idea" who Mr. Burton was. (*Id.* at p. 60, l. 17). This was due, in part, to the fact that Ms. Kincaid did not actually show the Morgans the various written offers provided by Mr. Burton. (R. Morgan Depo, p. 69, l. 7-18). Despite their signed acknowledgment of the Notice of Agency Relationship identifying Mr. Burton as the buyer's agent on November 3, 2004, the Morgans claim that they did not realize a buyer's agent was involved in the negotiations until after closing. (V. Morgan Depo, p. 17, l. 4-8).

After selling their property to Terra Firma, the Morgans left for Florida on December 26, 2004. (R. Morgan Depo, p. 98, l. 19). They returned home in March of 2005 and were told by a neighbor that they had sold to "Consolidated Coal". (V. Morgan Depo,

[4] The deed is attached to Terra Firma's "Motion for Summary Judgment" as Exhibit D.

p. 21, l. 3-7). Almost 18 months later, during the Summer of 2006, Mr. Morgan contacted Neil Jenkins, of Consolidation Coal Company, to discuss his newfound concerns regarding the sale of the property to Terra Firma. (Hearing Transcript, 1/18/06, p. 10, l. 9-24)[5]. According to Mr. Morgan, Mr. Jenkins asked him what he would like to feel better about the sale. (R. Morgan Depo, p. 103, l. 15-19). Mr. Morgan responded, "well, I would like to have what it is worth". (*Id.* at p. 103, l. 24). Mr. Morgan also inquired about retaining the home. (*Id.* at p. 104, l. 2). Mr. Jenkins asked whether that would satisfy Mr. Morgan and he responded affirmatively. (*Id.* at p. 104, l. 9). Mr. Jenkins explained that he would follow-up with Mr. Morgan regarding his concerns. (*Id.* at p. 104, l. 11). In the meantime, the Morgans failed to make required rental payments under the terms of their lease. After the Morgans failed to make these payments, counsel for Terra Firma provided formal notice of the lease termination by letter dated November 28, 2005.

The Claim for Reformation

The Morgans claim that they were misled on two occasions, first during negotiations and later at closing. Based on these misrepresentations, the Morgans maintain that reformation of the deed price is merited. The first misrepresentation by Terra Firma allegedly occurred during the course of negotiations between Mr. Burton and Ms. Kincaid. However, the Morgans had no direct communication with Mr. Burton during the course of negotiations. Any information the Morgans received regarding the identity or the intentions of Terra Firma was relayed by their realtor. Ms. Kincaid testified that Mr. Burton did not tell her what Terra Firma intended to do with the property and stated that she was unaware of Terra Firma's intent with the

[5] The hearing transcript is attached to Terra Firma's "Motion for Summary Judgment" as Exhibit F.

property. (*Id.* at p. 106, l. 18-20). Whatever awareness she did have was based on her own speculation. (Kincaid Depo., p. 22, l. 9 – 14).

Ms. Kincaid's recollection is also consistent with Mr. Morgan's testimony wherein he stated that Kincaid told him that she presumed the land would be used for "land development". (R. Morgan Depo., p. 62, l. 20 – p. 63, l. 5). According to Mr. Morgan, the phrase "land development" is not compatible with anything other than housing subdivisions. (*Id.* at p. 63, l. 23 – p. 64, l. 1). None of these representations or assumptions were made by Terra Firma or Mr. Burton. Additionally, Mr. Burton's recollection that he was unaware of Terra Firma's identity and intended use is consistent with Mr. Morgan and Ms. Kincaid.

The second alleged misrepresentation occurred at the real estate closing in December of 2004. According to Mr. Morgan, he specifically asked what Terra Firma intended to do with the property and received as an answer, "rest assured, it is for land development purposes only". (Morgan Depo, p. 91, l. 18-24). Whether this statement occurred or not is taken as true for the purposes of this appeal. This statement, made six weeks after the contract came into force, is the only evidence in the record that the Morgans may have had concerns about the identity or intended use of the property.

Procedural History

On January 6, 2006, Terra Firma instituted the above-styled action by filing its "Petition for Wrongful Occupation of Residential Real Estate" in the Circuit Court of Monongalia County, West Virginia, based on the Morgans' failure to vacate the Subject Property and pay back rent. The Morgans served their "Answer and Counterclaim" on January 13, 2006. The Morgans' counterclaim purported to seek damages based on retaliation by Terra Firma and

the Morgans' reformation claim. On January 18, 2006, the Circuit Court entertained the "Petition for Wrongful Occupation of Residential Real Estate." The Circuit Court then ordered the Morgans to vacate the Subject Property by March 31, 2006, and to pay Terra Firma back-rent from August 2005 through January 2006. The Circuit Court also ordered the Morgans' Counterclaims to remain pending pursuant to the West Virginia Rules of Civil Procedure.

On March 31, 2006, the Circuit Court entertained Terra Firma's "Motion to Dismiss," which was directed toward the "reformation" claim presented by the Morgans. During that hearing, the Circuit Court treated the motion as a "Motion for More Definite Statement" and ordered the Morgans to amend their second counterclaim. On April 7, 2006, the Morgans served "Respondents' More Definitive Statement of Counterclaim of Respondents" seeking reformation of the purchase price based on the alleged misrepresentations. The parties engaged in significant discovery following the March 31, 2006 hearing.

On June 8, 2006, Terra Firma filed a Motion for Summary Judgment. In it, Terra Firma claimed that it was entitled to summary judgment on all counts because the undisputed record established that Terra Firma did not breach any duty, nor violate any law, relative to its purchase of the Morgans' real property, or in seeking the relief set forth in the "Petition for Wrongful Occupation of Residential Real Estate." On June 26, 2006, the Morgans filed a Motion for Continuance, alleging that additional discovery was warranted. On June 29, 2006, the Circuit Court granted this motion.

After 11 months of additional discovery, on May 29, 2007, Terra Firma renewed its "Motion for Summary Judgment." The Morgans served "Respondents' Reply to Petitioner's Motion for Summary Judgment" on June 4, 2007. Therein, the Morgans abandoned their claim

of retaliatory eviction. The next day, Terra Firma filed and served "Petitioner's Reply in Support of Motion of Summary Judgment." On June 7, 2007, the Circuit Court entertained oral argument on Terra Firma's renewed "Motion for Summary Judgment."

After careful review of the documents submitted, the arguments of the parties, and the record developed in the matter, the Circuit Court granted Terra Firma's Motion for Summary Judgment by Order dated June 15, 2007. Thereafter, on July 2, 2007, the Morgans filed and served "Respondents' Motion to Alter/Amend/Set Aside Order Granting Summary Judgment," which the Circuit Court denied by Order dated August 31, 2007. It is from this Order granting summary judgment that the Morgans appeal.

RESPONSE TO ASSIGNMENTS OF ERROR

I. **The Circuit Court Correctly Granted Summary Judgment as a Matter of Law Because Reformation of a Deed is a Severe Remedy Reserved for Limited Circumstances which the Morgans Fail to Demonstrate.**

II. **The Circuit Court Correctly Granted Summary Judgment as a Matter of Law Because Burton Did Not Have a Duty to Disclose Consol Energy, Inc. as an Undisclosed Principal or its Intended Use of the Subject Property.**

III. **The Circuit Court Correctly Granted Summary Judgment as a Matter of Law Because the Inequitable Conduct Alleged by the Morgans was Immaterial to the Morgans' Decision to Sell the Subject Property.**

IV. **The Circuit Court Correctly Granted Summary Judgment as a Matter of Law Because the Findings of Fact are Completely Supported by the Record.**

AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

Standard of Review

This Court has stated that it will "review a Circuit Court's entry of summary judgment under Rule 56 of the West Virginia Rules of Civil Procedure *de novo*." Syl. pt. 1,

Painter v. Peavy, 451 S.E.2d 755 (W. Va. 1994). Summary judgment is mandated if the record, when reviewed most favorably to the nonmoving party, discloses "that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Id.* at 758. Summary judgment is appropriate where the non-movant fails to present evidence sufficient to allow a reasonable juror to conclude that his position, more likely than not, is true. *Gentry v. Mangum*, 466 S.E.2d 171, 177-78 (W. Va. 1995) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). Its principal purpose "is to isolate and dispose of meritless litigation." *Id.* at 177-78, n. 5 (citing *West Virginia Pride, Inc. v. Wood County*, 811 F.Supp. 1142 (S.D.W.Va.1993)).

As further explained by this Court in *Painter v. Peavy*, "the party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Id.* at 758-59.

> [W]hile the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some "*concrete evidence* from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor" or other "*significant probative evidence* tending to support the complaint."

Id. at 759 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (emphases added).

More recently, in *Barbina v. Curry,* 650 S.E.2d 140 (W. Va. 2007), this Court clarified that mere speculation or the construction of inferences upon one another is insufficient to defeat summary judgment:

> We have made clear that "*[u]nsupported speculation* is not sufficient to defeat a summary judgment motion." *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 338 (W.Va. 1995) (quoting *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987)). While it is true that "the nonmoving party is entitled to the most favorable inferences that may reasonably be drawn from the evidence, [such evidence] '*cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.*'" *Marcus v. Holley*, 618 S.E.2d 517, 525 (W.Va. 2005) (quoting *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985)). Further, "[t]he evidence illustrating the factual controversy cannot be conjectural or problematic." *Williams*, 459 S.E.2d at 338.

Barbina, 650 S.E.2d at 148 (emphases added).

In *Williams*, this Court mandated summary judgment where "the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." *Syl. Pt. 2, Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W.Va. 1995). Because the Morgans fail to identify genuine issues of material fact as to essential elements of their case, and because the Morgans merely duplicate the speculative and inferential arguments that the Circuit Court deemed insufficient to raise a genuine issue of material fact, summary judgment was therefore proper and the appeal should be denied.

DISCUSSION OF LAW

The Morgans ask this Court to reinstate their action for reformation of the deed price resulting from the sale of their property to Terra Firma. They argue that they have a right to reform the purchase price, despite having negotiated and agreed to a fair and reasonable price, because Terra Firma allegedly failed to disclose information regarding its corporate structure and/or intended use of the property. This Court should reject this argument. The importance of

these facts was known only to the Morgans and never carried significance until, approximately 18 months after having executed an enforceable contract and the applicable closing documents, the Morgans learned that Consol Energy, Inc. was the parent company of Terra Firma. Further, mandating that an agent must volunteer this kind of information, unprovoked by the seller, would significantly compromise an agent's bargaining leverage.

Simply put, summary judgment is proper where the Morgans' sole objective is to present to a jury that they wish now they had "held out" for even more money. The Circuit Court agreed and this Court should affirm the Circuit Court's refusal to reform a perfectly valid contract.

I. The Circuit Court Correctly Granted Summary Judgment as a Matter of Law Because Reformation of a Deed is a Severe Remedy Reserved for Limited Circumstances which the Morgans Fail to Demonstrate.

This Court has spoken to the appropriateness of deed reformation, holding that such a remedy is generally reserved for cases of mutual mistake, but leaving open the possibility of reformation upon a clear and convincing showing of unilateral mistake by one party and fraud or inequitable conduct by the other party. *Lusher v. Sparks*, 122 S.E.2d 609, 615 (W. Va. 1961). "[A] court of equity should not reform a contract for the sale of land, which is clear and unambiguous in its terms, nor enlarge the provisions of a deed made in conformity with the contract, which would give to the grantees in the deed more land than they contracted for." *Eiland v. Powell*, 65 S.E.2d 737, 742 (W. Va. 1951).

Where a party alleges fraud or inequitable conduct as the basis for their prayer for reformation, West Virginia law imposes upon that party an imposing burden of proof.

> In order to authorize reformation, the instrument must fail to express the parties' agreement or intention, either because of mutual mistake or because of *mistake, inadvertence, or accident on one side and fraud or inequitable conduct on the other.*. To warrant such reformation, the proof must be *strong, clear and convincing*.

Lusher, 122 S.E.2d at 615 (citations omitted) (Italics supplied).

> A deed is an instrument executed with formality and imports full and complete exposure of the intent of the parties. It speaks the final agreement by the clearest and most satisfactory evidence. In some instances the courts have gone so far as to hold that it would be an extreme case where it would reform a written instrument upon the uncorroborated testimony of a party thereto, even if such testimony is not contradicted. The books are full of cases which reveal the high degree of caution which courts exercise in such matters. *The relief will be denied whenever the evidence is loose, equivocal, or contradictory, or is open to doubt or opposing presumptions.*

Donato v. Kimmins, 139 S.E. 714, 715-716 (W. Va. 1927) (emphasis added).

In evaluating the validity of a deed, this Court adopted the following rule: "A deed must be upheld if possible. All instruments must be so construed as to pass an estate, when such was the intention; and it will be presumed from the making of a deed that the grantor intended to convey some property by it." *Heartland, L.L.C. v. McIntosh Racing Stable, L.L.C.*, 632 S.E.2d 296, 301 (W. Va. 2006), quoting Syl. Pt. 7 *Proudfoot v. Proudfoot*, 591 S.E.2d. 767 (W. Va. 2003). A deed will not be set aside for misrepresentation or fraud upon the part of the grantee, except upon a clear showing of one or more of these facts by the evidence. *Id.* (citing *Hardin v. Collins*, 23 S.E.2d 916 (W.Va. 1942)). Once the trial judge finds that an otherwise valid deed was not obtained by fraud or duress, the court is required to find the deed valid and the grantor will be left with no legal remedy. *Proudfoot v. Proudfoot*, 591 S.E.2d 767, 772 (W. Va. 2003).

Whether the Morgans seek rescission or reformation of the deed at issue, *Lusher* requires them to establish their own mistake, as well as some "fraud or inequitable conduct" by Terra Firma. Reformation of a deed will not be granted because of mistake unless fraud or inequitable conduct is clearly established. *National Fruit Product Co. v. Parks*, 150 S.E. 749 (W.Va. 1929). Consequently, in addition to proving their own mistake, they must prove all of the necessary elements of a misrepresentation claim to establish the "fraud or inequitable conduct" required by *Lusher*. Furthermore, a prayer for deed reformation imposes an increased burden of proof, requiring the Morgans to establish each element by "strong, clear and convincing" evidence. *Lusher*, 122 S.E.2d at 615.

In order to establish a claim for misrepresentation, the Morgans must prove: (1) that a misrepresentation was committed by Terra Firma or induced by it; (2) that the misrepresentation was material and false; (3) that the Morgans relied upon the misrepresentation and were justified under the circumstances in doing so, and (4) that the Morgans were damaged because of their reliance. *Kidd v. Mull*, 595 S.E.2d 308, 313 (W. Va. 2004).

Because the Morgans have failed to "make a sufficient showing on" the "essential element[s]" of their reformation claim, and "the record could not lead a rational trier of fact to find" in their favor, the Circuit Court appropriately granted summary judgment. *Syl. Pt. 2, Williams*, 459 S.E.2d at 329. Furthermore, because Terra Firma obtained a valid deed, and because the elements of fraud or duress are not present, this court is required to find the deed valid. *Proudfoot*, 591 S.E.2d at 772.

A. The Morgans Fail to Demonstrate Mistake as Required by Lusher.

In their Brief, the Morgans point to Ms. Kincaid's speculation regarding Terra Firma to establish their unilateral mistake of fact. The Morgans rely solely on an unsupported, conclusory assertion that Ms. Kincaid's speculation "evidences that the Morgans were clearly mistaken about the (1) identity and (2) intended use of the property." Appellant Brief at 15. The Brief makes no attempt to refute or disprove the Circuit Court's reasoning in reaching the following conclusions:

> (29) To meet the legal definition of "mistake" called for by *Lusher*, the Morgans' mistake or ignorance of fact regarding Terra Firma's corporate structure and intended use of the property must be material, and such that the Morgans could not have discovered the facts through reasonable diligence. *Simmons v. Looney*, 24 S.E. 677, 678 (W. Va. 1896);
>
> (30) There is no indication in the record that Terra Firma's corporate structure or intended use of the property were material to the negotiations that culminated with the execution of the Real Estate Purchase Agreement. By Mr. Morgan's own admission, only price, hunting rights, and the leaseback provision were "important";
>
> (31) The record is devoid of any inquiries directed by the Morgans to Terra Firma regarding Terra Firma's corporate structure and intended use of the property prior to the execution of the Real Estate Purchase Agreement. The Morgans did not demonstrate "reasonable diligence" to cure their ignorance of fact with regard to the issues they now raise. *Simmons*, 24 S.E. at 678;

Order, ¶¶ 29-31, page 10.

Thus, in proving a mistake of fact the Morgans have two hurdles to pass: (1) that the mistake was material; and (2) that the mistake could not have been discovered through reasonable diligence. *Simmons*, 24 S.E. at 678. The Morgans' claim of unilateral mistake fails

on both fronts. First, because the Morgans neglected to articulate Terra Firma's corporate identity and its intended use of the Subject Property as important concerns until after the parties executed the purchase agreement, they cannot now assert that those terms are material. Second, because the Morgans failed to make these inquiries prior to entering into an enforceable contact, although they were perfectly free to do so, they cannot now assert that they demonstrated reasonable diligence with regard to those issues.

This conclusion is evidenced by the undisputed facts. The only two people directly involved in the negotiations for the purchase of the Subject Property were Ms. Kincaid, the Morgans' agent, and Mr. Burton, Terra Firma's agent. Mr. Burton's undisputed testimony is that he never told Ms. Kincaid what Terra Firma intended to do with the property. Similarly, Ms. Kincaid's undisputed testimony is that Mr. Burton never told her what Terra Firma intended to do with the property. Indeed, the information that Ms. Kincaid relayed to Mr. Morgan regarding the intentions of Terra Firma was simply a product of her own *speculation* (Kincaid Depo, p. 22, l. 9 – 14), a fact which Mr. Morgan acknowledged during his deposition testimony. (R. Morgan Depo., p. 62, l. 20 – p. 63, l. 5) ("she *presumed*, and someone had to tell her this, that was [sic] for businessmen or attorneys for a land investment, and that is what she told me, land development". (emphasis added).

As noted earlier,[6] Ms. Kincaid's deposition testimony revealed that the Morgans were aware of the possibility Terra Firma would use the property for coal production purposes and relied on that knowledge to reject the first two offers made by Terra Firma. Notwithstanding the Morgans' desire to tell their story to a jury, their claim is precisely the sort that qualifies as "unsupported speculation" rejected by the *Williams* court. *Williams*, 459 S.E.2d at 338. The

[6] *See* Order, ¶ 24, page 9.

Morgan's attempt to escape the terms of a valid contract, therefore, exemplifies the type of claim contemplated by Rule 56 of the West Virginia Rules of Civil Procedure. As such, this Court should affirm the Circuit Court's dismissal.

B. The Morgans Fail to Demonstrate the Elements of Misrepresentation to Establish a Claim for Fraud or Inequitable Conduct.

In the event the Morgans produced sufficient evidence of a unilateral mistake, they would also have to produce evidence of inequitable conduct by Terra Firma. *Lusher*, 122 S.E.2d at 615. "[W]here a suit for reformation of a written instrument is based on mistake of the plaintiff and fraud of the defendant, relief will not be granted the plaintiff unless the defendant's fraud be clearly and fully proved, though the mistake of the plaintiff be established. The two elements must concur." *National Fruit Product Co. v. Parks*, 150 S.E. 749, 751 (W.Va. 1929). Thus, in considering whether Terra Firma engaged in inequitable conduct, West Virginia law requires the Morgans to produce evidence sufficient to create a material issue of fact as to whether they can establish each element set forth in *Kidd* by "strong, clear and convincing" evidence. *Lusher*, 122 S.E.2d at 615;

As noted earlier, to establish misrepresentation by Terra Firma, the Morgans must prove four elements: (1) that a misrepresentation was committed by Terra Firma or induced by it; (2) that the misrepresentation was material and false; (3) that the Morgans relied upon the misrepresentation and were justified under the circumstances in doing so, and (4) that the Morgans were damaged because of their reliance. *Kidd*, 595 S.E.2d at 313.

The Morgans fail to prove the first element of fraud, that Terra Firma committed or induced misrepresentation, because a valid contract had already been formed before any alleged misrepresentation occurred. Nevertheless, the Morgans assert two instances of

misrepresentation: First, that Terra Firma failed to inform Mr. Morgan that "[Terra Firma] was a coal company" when asked; and second, that "a man across from" Mr. Morgan at the closing told him that the Subject Property was being acquired "for land development purposes only". Appellant Brief at 13. Even assuming the accuracy of these alleged misrepresentations, they do not constitute inequitable conduct for several reasons.

First, the premise on which these misrepresentations rest presumes that an enforceable contract had not yet been created. As noted, this is simply not the case. The Morgans agreed to sell their property to Terra Firma long before they ever met or spoke with Mr. Burton during the closing. The Morgans were therefore obligated under the terms of the purchase agreement to proceed with closing and to sign a deed.

Second, the record demonstrates that Terra Firma could not possibly have induced the Morgans to sell though misrepresentation because the Morgans unilaterally chose to list and sell their property prior to receiving any offers. Terra Firma had no involvement in this process. Moreover, there is no evidence to suggest that the Morgans agreed to the purchase price of $525,000.00 based on Terra Firma's intent to develop the land for residential subdivisions rather than constructing a commercial facility to mine coal. Indeed, Mr. Morgan acknowledged that they agreed to the purchase price of $525,000.00 because of Ms. Kincaid's information that no other property in the vicinity had received this kind of offer. In other words, Terra Firma's offer induced the Morgans to sell, not Terra Firma's intent with the property.

Third, as noted by the Circuit Court, even if it is accepted that the "land development" statement was made by an agent of Terra Firma, the statement hardly rises to the level of the "extreme case" required to "reform a written instrument upon the uncorroborated

testimony of [Mr. Morgan], even if such testimony is not contradicted." *Donato v. Kimmins*, 139 S.E. at 715.

The Morgans also fail to prove the second element of fraud, that the misrepresentations were material, because they failed to produce any evidence establishing that the identity of the buyer and/or the intended use of the Subject Property affected their *decision to sell* the Subject Property to Terra Firma. Any alleged misrepresentation or alleged failure to reveal an undisclosed principal cannot be characterized as material because the Morgans failed to notify Terra Firma that these issues were material to the Morgans' decision to sell the Subject Property. It was only after Consol Energy, Inc.'s identity as the parent of Terra Firma was revealed – some 18 months after the transaction – that these issues became "material" to the Morgans; and as previously mentioned, a fully enforceable contract had already been formed.

Next, the Morgans cannot prove the third element of fraud, that they justifiably relied on misrepresentation by Terra Firma, because they had absolutely no contact with any representative of Terra Firma prior to the execution of the Real Estate Purchase Agreement. Any reliance by the Morgans on statements by their agent, Ms. Kincaid, is irrelevant because Ms. Kincaid's undisputed testimony is that her statements or presumptions regarding the Subject Property were not induced by Terra Firma, or its agent, Mr. Burton. Because there were no misrepresentations made, there was no possibility of reliance.

Finally, the Morgans cannot prove the fourth element of fraud, that they were damaged by Terra Firma's misrepresentation, because it was their decision to sell the Subject Property and because they reaped a substantial profit on the transaction. The record shows that this transaction netted the Morgans a $340,000.00 return on their eight year investment. As the

Circuit Court aptly concluded, "seller's remorse based on the discovery that one's neighbors may have negotiated better terms in similar transactions does not constitute 'damage' in the sense contemplated by the claim asserted by the Morgans." Order ¶ 43, p. 12.

Thus, after examining the elements to prove a claim for misrepresentation, it becomes clear that the Morgans fail on all fronts. Because there was no misrepresentation committed or induced by Terra Firma, it could not therefore be material and false. Because a misrepresentation did not occur prior to the contract, the Morgans could not justifiably rely on it. Finally, because the Morgans earned a substantial return on their investment and merely ask this Court to allow them to negotiate a higher price for higher profit, they were not damaged in the sense contemplated by *Kidd*. Accordingly, their claim for misrepresentation fails, and the Circuit Court correctly granted summary judgment as a matter of law.

II. The Circuit Court Correctly Granted Summary Judgment as a Matter of Law Because Burton Did Not Have a Duty to Disclose Consol Energy, Inc. as an undisclosed principal or its intended use of the Subject Property.

The Morgans rely heavily on the "Notice of Agency Relationship" form[7] – a boilerplate form promulgated by the West Virginia Real Estate Commission all brokers are required to provide their clients (W.Va. Code § 30-40-26(d)) – to support their argument that Mr. Burton owed them a duty to disclose information about Terra Firma's corporate structure and intent with the Subject Property. In doing so, the Morgans attempt to distort their relationship with Mr. Burton, and in effect, portray themselves as his client.

Pursuant to the form, the Morgans allege that Mr. Burton was required to "disclose all facts known to the agent materially affecting the value or desirability of the

[7] The Notice of Agency Relationship form is attached to Appellants' Brief as Exhibit C.

property" to them. Even assuming *arguendo* that Mr. Burton knew[8] Terra Firma's corporate identity and intent with the property based on a tangential connection between Terra Firma and Consol Energy, Inc., he still had no duty to volunteer such information. Because the Morgans failed to notify Mr. Burton that these facts were material to the Morgans' decision to sell the Subject Property, because Mr. Burton made no misrepresentations regarding these facts, and because Mr. Burton would have breached his primary duty to Terra Firma had he had volunteered such information, he did not violate the terms of the "Notice" nor breach any duty to the Morgans.

A. The Notice of Agency Relationship did not create a dual agency relationship between the parties.

It is important to clarify that no dual agency relationship existed between Mr. Burton and the Morgans. During oral argument on the motion for appeal, the Morgans erroneously led this Court to believe that Mr. Burton had entered into a dual agency relationship with them, imposing a heightened duty upon Mr. Burton *vis a vis* the Morgans. Because of this dual agency relationship, the Morgans argued, Mr. Burton was obligated to inform them about the identity of Consol as the principal purchaser and its intended use for the Subject Property. As will be more fully explained, this is erroneous.

Irrespective of the duties that existed between the parties, a dual agency relationship could not possibly have existed between Mr. Burton and the Morgans because the

[8] The Morgans infer this knowledge based upon two check stubs issued by Steptoe & Johnson, one received by Mr. Burton listing "consol/Battelle" as a client, and another received by Bel-Cross Properties listing "Consolidation Coal Company/Battelle Properties" as a client. From these stubs, the Morgans assert that Burton's denial of such knowledge is a "genuine issue of material fact." Appellant Brief, p. 2. n. 2. Even if taken as true, this fact is not in issue because (1) Mr. Burton never had a duty to volunteer confidential information compromising his principal's bargaining position, and (2) Mr. Morgan never asked Mr. Burton or Terra Firma to reveal such information prior to the contract.

record clearly shows that the Morgans had retained the services of Ms. Kincaid as their real estate agent. Order, ¶ 4, p. 7. Dual agency occurs when a real estate agent represents both buyer and seller in the same transaction. *See* Restatement 3d of Agency § 3.15, cmt. f. (2006). As evidenced by the Notice of Agency Relationship ("Notice") form, Burton is clearly identified as the "Buyer's [Terra Firma] Agent", not the sellers. Additionally, the Notice clearly stated that Mr. Burton had no obligation to reveal confidential information to the Morgans. Finally, in addition to Kincaid's presence as the Morgans' agent and the "Notice" defining Mr. Burton's status as Terra Firma's agent, the Buyer Agency Agreement between Mr. Burton and Terra Firma expressly prohibited him from engaging in a dual agency relationship. Thus, despite the Morgans' suggestion to the contrary at oral argument, such a dual relationship did not exist.

A dual agency relationship creates an obvious conflict of interest because the agent has essentially promised a duty of confidentiality, loyalty, and full disclosure to both parties simultaneously. Accordingly, well-established principles of law and industry practice stipulate that a broker may not represent both a buyer and a seller unless both parties know of and consent to the dual representation. *Truslow v. Parkersburg Bridge & Terminal R. Co.*, 57 S.E. 51, 53 (W.Va. 1907) (asserting that an agent cannot represent both the buyer and the seller in the same transaction without the intelligent consent of both parties). As evidenced by the "Notice," this did not happen.

An obvious consequence of entering into a dual agency relationship is that it would compromise Terra Firma's bargaining power with the Morgans, such as the maximum price it was willing to pay to acquire the Subject Property. As is well-known, a broker may not disclose confidential information without breaching his duty to his principal. *Moore v. Turner*, 71 S.E.2d 342, 351 (W.Va.1952) (asserting that the general rule is that a broker must act with the

"utmost good faith towards *his* principal" and that he is "under a legal obligation to disclose to *his principal* all facts within his knowledge which are or may be material to the transaction in which he is employed . . . .") (emphasis added). Mr. Burton's principal was Terra Firma, not the Morgans.

Relying on the Notice of Agency Relationship form to impose a duty upon Mr. Burton to disclose the identity of an undisclosed principal is tantamount to requiring him to relinquish bargaining leverage he was obligated to protect. This illogical outcome is not supported in law and is negated by the very form on which the Morgans rely. Because both the Morgans and Terra Firma retained a real estate agent, and because neither party consented to dual representation, it is simply not possible for a dual agent relationship to exist. Therefore, this court must reject any suggestion to the contrary.

B. It is perfectly legal for Consol Energy, Inc. to form a subsidiary with the intent to acquire property in an expeditious and economical fashion.

In their brief to the Court, the Morgans repeatedly assail Consol Energy, Inc. for creating a "shell company," for "misrepresentation," and for having a strategic business plan to acquire land "in the most expeditious and economical fashion." Appellant Brief, p. 2, 8, 9, 11, 13, 14, 17. The Morgans maintain that "Consol wanted to hide its identity as the purchaser of the properties in order to derive a lower price" and that this goal rendered Consol's plan improper. *Id.* at p. 2. However, the law with respect to undisclosed principals endorses Terra Firma's and Bill Burton's actions. *See e.g., Finley v. Dalton*, 164 S.E.2d 763 (S.C. 1968); Restatement 3d of Agency, § 6.11, comment d (2006). Thus, Consol's business plan is proper for several reasons.

First, Consol Energy, Inc. is entirely justified in embracing the twin goals of expediency and efficiency, as every business in this state pursues the same. Indeed, these purposes are woven into the very fabric of our economy. The Morgans' attempt to indict Consol for entertaining these goals demonstrates the lack of support for their argument.

Second, it is well-established that while the agent cannot mislead a third party as to the identity of its principal, there is no duty to disclose its principal. *See e.g., Standard Steel Car Company v. Stamm*, 207 Pa. 419 (1903); *See also* Restatement 3d of Agency, § 6.11, comment d. During oral argument, Counsel for the Morgans actually acknowledged this fact. As such, it is entirely legal for Consol Energy, Inc. to form a subsidiary to acquire real estate and to withhold its corporate identity. Indeed, as the Restatement makes clear, the law will protect an undisclosed principal who purchases property from a third party who may later regret the sale upon learning the purchaser's identity. *Id.* In relevant part, it states:

> Such regret on the part of a seller is often based on a belief that, had the purchaser's identity been known, the seller would have demanded, and the buyer would have paid, a higher price. The regretful seller may suspect that, for the purchaser, the goods or property had a special and above-market value that would have enabled the seller to bargain for a higher price. Since such negotiations did not take place, it would be difficult to determine how significant a role the purchaser's identity would have assumed in them. Moreover, the seller has manifested assent to be bound at a price then satisfactory to the seller.

Restatement 3d of Agency, § 6.11, comment d.

Thus, Terra Firma's existence and purpose are perfectly legal. Because the Morgans made no inquiry as to the existence and/or identity of any principals involved in the transaction prior to the execution of the Real Estate Purchase Agreement; and because the

Morgans never manifested an unwillingness to deal with Consol, Burton had no duty to disclose Consol's existence. Case law is illustrative on this point.

(1) The *Finley* Analogue.

A purchaser's identity should have no bearing on the market value of the property. Nevertheless, the Morgans rely entirely on the Notice of Agency Relationship Agreement to assert that Burton owed a duty to disclose Consol's identity as the true purchaser of the Subject Property because this fact "materially affected its value." *See e.g.*, Appellant Brief p.16-17. Notwithstanding the misleading notion of this statement, the Morgans fail to cite a single piece of authority supporting this contention.

There is a reason for this disparity. Most of the reported cases in West Virginia involving misrepresentation and real property transactions involve purchaser's claims against *sellers* for concealing defects in the property such as foundational problems or environmental hazards. *See e.g.*, *Thomson v. McGinnis*, 465 S.E. 2d 922, 926, (W.Va. 1995) (holding that a vendor's real estate broker may be liable to a purchaser if the broker makes material misrepresentations with regard to the . . . residential property or fails to disclose defects or conditions in the property substantially affecting its value) (citing *Teter v. Old Colony*, 441 S.E.2d 728, 735 (W. Va. 1994); *Thacker v. Tyree*, 297 S.E. 2d 885, 888 (W.Va. 1982) ("[w]here a vendor is aware of defects or conditions which substantially affect the value or habitability of the property and the existence of which are unknown to the purchaser and would not be disclosed by a reasonably diligent inspection, then the vendor has a duty to disclose the same to the purchaser. His failure to disclose will give rise to a cause of action in favor of the purchaser").

There are no reported cases in West Virginia addressing a vendor's claim against a purchaser for allegedly misrepresenting the purchaser's intentions with the property. Materiality in the context of undisclosed principals, however, has been addressed by other courts.

For instance, in *Finley*, the Plaintiff filed suit in equity to rescind a deed to real estate because of alleged fraudulent misrepresentations on the part of the buyer as to the intended use of the property. *Finley v. Dalton*, 164 S.E.2d 763, 764 (S.C. 1968). Duke Power Company, the undisclosed principal, developed a plan to acquire a large tract of land in South Carolina to construct a large hydro electric power project. *Id.* An undisclosed real estate purchasing agent by the name of Dalton approached Plaintiff and represented that he, Dalton, wanted to purchase Plaintiff's 138 acre tract and that he wished to conclude the transaction quickly. *Id.* The Plaintiff inquired of Dalton's desire to proceed quickly, and Dalton *falsely* represented that he had just come into a large sum of money that he wanted to reinvest promptly in a timber investment for his children. *Id.* The Plaintiff claimed but for the false and fraudulent misrepresentations of Dalton, that Plaintiff could have disposed of his property to Dalton's corporate principal for a higher price. *Id.* at 765.

In reviewing these facts, the Supreme Court of South Carolina noted the following general authority:

> A misstatement or misrepresentation made in negotiations for the purchase of land as to the use which the purchaser intends to make of the land or the purpose for which he wants it does not necessarily constitute fraud, especially where the use for a different purpose from that stated does not injuriously affect the vendor by reason of his ownership of other land in the vicinity.

Id. at 765-766 (citing 55 *Am. Jur.*, Vendor and Purchaser, § 95).

The Court determined that Dalton's false representation was not directed to the value of the land and did not operate as an inducement to Plaintiff to sell. *Id.* at 766. Moreover, the Court noted that no fiduciary relationship existed between the parties, and that there was no indication that Plaintiff intended his inquiry as a solicitation for information upon which to base the sale. *Id.* Although the Court acknowledged Plaintiff's allegation that the value of the land for hydro electric purposes was greater than the consideration received by him, the Court stated that Plaintiff's complaint was "nothing more than a statement that he would have demanded more money if Dalton had revealed the purpose for which the property was being purchased." *Id.* Consequently, the Court dismissed Plaintiff's complaint because the alleged misrepresentation was not material. *Id.* at 767.

The facts in *Finley* are dispositive of the Morgans' claims. The record is void of any suggestion that Terra Firma's corporate structure or intended use of the property were material to the transaction. As Mr. Morgan acknowledged, the only "important" aspects of the negotiations included the purchase price, lease rights, and hunting rights. As such, Terra Firma's intended use of the property was not negotiated, nor was it the basis for the Morgans' decision to sell or to execute the purchase agreement.

The Morgans are clearly seeking the same relief that the Plaintiff in *Finley* asserted. In their own words, the Morgans would have held out for more money had they known what Terra Firma intended to do with the property. V. Morgan Depo., p. 21, l. 9-12. As in *Finley*, these facts fail to satisfy the materiality element required for misrepresentation on behalf of a purchaser.

(2) An adversarial dispute regarding the proper construction of a legal document does not create an issue of *fact*.

Under West Virginia law, "[i]t is the province of the court, and not of the jury, to interpret a written contract." *Estate of Tawney v. Columbia Natural Res., LLC*, 633 S.E.2d 22, 30 (W. Va. 2006). The Morgans attempt to *create* an issue of fact based on adversarial differences in the interpretation of the "Notice" is unsupported by controlling precedent. The Circuit Court properly adjudicated the dispute by finding that the "Notice" *did not* impose a duty upon Mr. Burton to disclose Terra Firma's corporate structure and intended use of the property.

The Morgans find fault with the Circuit Court Order's failure to make a "finding about whether Mr. Burton personally knew (1) the true identity of the purchaser, or (2) the intended use of the property." Appellant Brief, p. 17. This argument is deficient in two respects. First, because the Circuit Court refused to impose an affirmative duty upon Mr. Burton to disclose facts which he could not be charged with knowing were material to the Morgans, Mr. Burton's knowledge is irrelevant. Second, the reference to "true identity" harkens back to the Morgans' flawed attempt to characterize Consol Energy, Inc.'s land acquisition strategy as an impermissible "corporate shell game." Appellant Brief, p. 14, 17. The "true identity" of the purchaser, as evidenced by the Purchase Agreement and deed, was Terra Firma Company, a wholly-owned subsidiary of Consol Energy, Inc., formed for the entirely legal purpose of acquiring land "in the most expeditious and economical fashion." Terra Firma Response to [Morgans'] Interrogatory No. 5.

As the Morgans simply reiterate the same conclusory arguments, devoid of legal support, there is no reason for this Court to alter the Circuit Court's rejection of the "Notice" as a

basis for inventing and imposing a duty on Mr. Burton to disclose Terra Firma's corporate structure to the Morgans.

III. The Circuit Court Correctly Granted Summary Judgment as a Matter of Law Because the Alleged Inequitable Conduct was Immaterial to the Morgans' Decision to Sell the Subject Property.

Mr. Burton cannot be expected to forecast what factors a prospective seller will deem material to the price of the property. Considering the Morgans unilaterally offered the property for $640,000.00, how could Mr. Burton possibly realize that the Morgans would demand entirely different prices depending on the resources available to the prospective purchaser? If Terra Firma's corporate structure was important, and thus "material" to the Morgans, they could have easily requested such information, either directly, or through their agent, Ms. Kincaid, prior to signing the Agreement. Had they done so, Mr. Burton would have been required to respond, but he was never given such an opportunity.

As explained by the Circuit Court, the critical time frame for analysis is what took place prior to November 3, 2004, when the Morgans accepted Terra Firma's offer of $525,000.00 and executed the Purchase Agreement. In light of the complete lack of communication between themselves and Terra Firma prior to the execution of the Agreement, the Morgans are forced to rely on the statement of an unidentified party to the closing. This alleged "misrepresentation" is irrelevant to the elements of the Morgans' reformation claim because it played no role in their decision to sell the Subject Property. As the Circuit Court appropriately held:

> (40) Any reliance by the Morgans on the alleged misrepresentation by the unidentified party to the closing is irrelevant because the statement had no bearing on the Morgans' decision to sale the property to Terra Firma. That decision was

> made and rendered legally enforceable by the execution of the Real Estate Purchase Agreement approximately six weeks earlier. The deed signing at closing constituted a mere formality of the previously executed contract.

Order ¶ 40, page 11.

The Morgans' Brief lacks any argument to refute the Circuit Court's conclusion regarding the timing of the alleged misrepresentation and its lack of impact on the Morgans' decision to sell. The Brief ignores this aspect of the Circuit Court's holding and simply repeats the unsupported, conclusory arguments rejected by the Circuit Court.

Nonetheless, the Morgans point to the alleged misrepresentation at closing and Mr. Burton's alleged silence. Such reliance fails to explain why the Circuit Court erred by relying on the timing of the alleged misrepresentation with respect to the Morgans' prior decision to sell. There is no issue of fact with respect to the key aspect of the Morgans' reliance on the "Notice." Prior to the execution of the Agreement, the Morgans never asked Mr. Burton, or Ms. Kincaid, to provide any information about Terra Firma. Consequently, it is impossible for a reasonable jury to conclude that he violated any of the duties imposed upon him by the "Notice."

Furthermore, it bears repeating that the Morgans were fully represented throughout the entire transaction, both by counsel and their real estate agent Ms. Kincaid. Prior to accepting Terra Firma's offer of November 1, 2004 of $525,000.00, the Morgans instructed Ms. Kincaid to transmit the Real Estate Purchase Agreement to their attorney, an experienced practitioner in real estate law in West Virginia. Order, ¶ 9, p. 7. Additionally, prior to the closing, the Morgans had a separate attorney review all the paperwork to ensure that everything was "in order." R. Morgan Depo., p. 89 l. 18-20. Notably, despite having the benefit of

counsel, the Morgans made no objection to the fact that a provision in the purchase agreement identifying the Grantee contained only a reference to "contact purchasers attorney." This provision would have allowed Terra Firma to have the property titled in any name that it wanted, had it chosen to do so. Clearly, if the identity of the purchaser had been an issue, the Morgans or their attorney would have insisted that different provisions be written into the contract.

The Morgans had ample opportunity to stipulate exactly to whom the property would be sold and were free to restrict the use of the property in any manner they saw fit. However, instead of raising these concerns prior to entering into an enforceable contract, the Morgans negotiated terms important to them *at that time*, and then completed the sale by signing the Real Estate Purchase agreement.

In relying almost exclusively on Mr. Morgan's alleged question at the closing, and by ignoring the significance of its timing, the Morgans prove its immateriality. Consequently, the Morgans fall squarely within the sightlines for summary judgment. The law does not allow the Morgans to use further *inferences* from Mr. Morgan's testimony to create an issue of fact regarding the materiality of Terra Firma's corporate structure and intended use. *Marcus,*, 217 W. Va. at 516 ("[T]he nonmoving party . . . 'cannot create a genuine issue of material fact through mere speculation or the building of one *inference* upon another'"); *Barbina*, 650 S.E.2d at 148 ("[u]nsupported speculation is not sufficient to defeat a summary judgment motion.") (citing *Williams*, 194 W.Va. at 61).

Thus, because Terra Firma's corporate structure and intended use of the property were immaterial, and because the Morgans failed to produce any evidence of "inequitable

conduct" by Terra Firma prior to their acceptance of its offer to buy the Subject Property, the Circuit Court appropriately granted summary judgment in favor of Terra Firma

IV. The Circuit Court Correctly Granted Summary Judgment as a Matter of Law Because the Findings of Fact are Completely Supported by the Record.

The Morgans' assertion that the record contradicts the findings of fact ignores key components of the Circuit Court's reasoning in reaching its conclusions and attempts to distract this Court by focusing on alleged statements that occurred after a valid contract between the parties came into force. Put simply, there is absolutely no evidence of any misrepresentations by Terra Firma prior to the execution of the Agreement. Consequently, it is impossible for the Morgans to satisfy the elements of *Kidd* and to succeed on a claim for reformation of the price they agreed to.

As to the Morgans' challenge to Paragraph 25 of the Order, the distinction between the Order's finding and the meaning of Vicki Morgan's deposition statement is unambiguous. Specifically, the Circuit Court concluded:

> (25) The Morgans do not assert that they would not have sold to Consol Energy, Inc., or that the possibility the land would be mined for coal would have altered their decision to sell the Subject Property.

Order, ¶ 25, p. 9.

Paragraph 25 is entirely accurate: Vicki Morgan never said the Morgans would not have sold to Consol, or that they would not have sold to a coal company; she only said they would not have sold to a coal company "*for the price*" which was accepted by the Morgans from Terra Firma. (V. Morgan Depo., p. 21, 1. 9-12). The Morgans had no objection to Consol

buying and/or mining the Subject Property; they are simply dissatisfied with the price which they negotiated and accepted. Moreover, their claim is for reformation, not rescission. The nature of relief they seek demonstrates that the Morgans were satisfied with every aspect of the contract except the price.

The Appellants' brief also asserts that Mr. Morgan's question at closing, and the alleged answer he received, affected the Morgans' decision to sell because "it was not a done deal" in Mr. Morgan's mind until this question was answered. The Circuit Court rejected this argument and agreed with Terra Firma that Mr. Morgan's personal understanding of what constitutes a "done deal" cannot trump well-settled principles of contract law which dictate that the execution of the Real Estate Purchase Agreement created an enforceable contract for the sale of the property six weeks prior to the closing[9].

The Morgans next take issue with paragraphs 37 and 40, wherein the Circuit Court enumerated why the Morgans failed to prove the elements of misrepresentation because the alleged inequitable conduct had no bearing on the Morgans' decision to sell the Subject Property. Here the Circuit Court concluded:

> (37) As to the second element, the Morgans have failed to produce evidence establishing that the identity of the buyer and/or the intended use of the subject Property was material to the *decision to sell* the Subject Property to Terra Firma. Any alleged misrepresentation or alleged failure to reveal an undisclosed principal cannot be characterized as material misrepresentation because Terra Firma received no notice or indication whatsoever that these issues were material to the Morgans' *decision to sell* the Subject Property;

[9] See e.g., *Rease v. Kittle*, 49 S.E. 150, 154 (W.Va. 1904) ("[A]n accepted offer of sale . . . constitutes a contract of sale, giving mutuality of remedy to both parties, by which either may enforce the specific performance of it").

(40) Any reliance by the Morgans on the alleged misrepresentation by the unidentified party to the closing is irrelevant because the statement had no bearing on the Morgans' *decision to sale* the property to Terra Firma. That decision was made and rendered legally enforceable by the execution of the Real Estate Purchase Agreement approximately six weeks earlier. The deed signing at closing constituted a mere formality of the previously executed contract;

Order, ¶ ¶ 37, 40 p. 11 (emphases added).

Again, the Morgans' "decision to sell" the property to Terra Firma was consummated by the Real Estate Purchase Agreement, not the closing. This conclusion, accepted by the Circuit Court in its grant of Summary Judgment, explains the accuracy of Paragraph 25, as well as Paragraphs 37, and 40 of the Order. Prior to the execution of the Real Estate Purchase Agreement, neither Terra Firma nor its agent, Mr. Burton, had any contact whatsoever with the Morgans and the alleged misrepresentation by an unidentified party occurred approximately six weeks after the Morgans decided to sell to Terra Firma.

Finally, the Morgans take issue with paragraph 22 wherein the Circuit Court concluded that because Mr. Burton was unaware that Terra Firma's principal and/or intended use of the Subject Property were important facts to the Morgans, he could not misrepresent those facts and therefore, could not violate any duties to the Morgans. Here the Circuit Court stated:

(22) Because Mr. Burton received no notice whatsoever that Terra Firma's intended use of the property was material to the Morgans' decision to sell the Subject Property, and because Mr. Burton made no misrepresentations regarding Terra Firma's intended use of the property, he did not violate the duties imposed upon him by the "Notice of Agency Relationship".

Order, ¶ 22, p. 9.

The Morgans continue to duplicate concerns rejected by the Circuit Court and fail to demonstrate how these concerns are "materially in dispute." Appellant Brief, p. 20. The Morgans rely on the terms set forth in the Notice of Agency Relationship form to support their assertion that Mr. Burton had a duty to disclose Consol Energy, Inc. as the principal purchaser of the Subject Property. However, this position is inconsistent with both the form and the law. As stated previously, the form prohibited Mr. Burton from disclosing confidential information. Furthermore, the law of agency does not require an agent to disclose the identity of its principal unless or until asked by a third party. Restatement 3d of Agency, § 6.11, comment d. The Morgans, however, never asked Mr. Burton about Terra Firma's corporate structure prior to entering into an enforceable contract; therefore, no duty to disclose this type of information arose.

Moreover, as stated previously, even if Mr. Burton understood Consol's involvement with Terra Firma, which contravenes his direct testimony, and assuming that Mr. Morgan did in fact ask during the closing whether a landfill or coal company was purchasing his property, these facts taken as true are irrelevant because they post-dated the execution of the Real Estate Purchase Agreement by six weeks. Thus, because the Morgans had no direct contact with Mr. Burton until the closing, he was unable to disclose any information to them prior to that date.

Additionally, the Morgans are not justified in relying on the Notice of Agency Relationship form to impose a duty on Mr. Burton to disclose information that would compromise his bargaining leverage with the Morgans and breach his primary duty to act with the "utmost good faith towards his principal", Terra Firma. *Moore*, 137 W.Va. at 315.

Therefore, because Terra Firma was never given notice that its corporate structure was material to the transaction, Mr. Burton had no duty to disclose the parent corporation's existence.

In order to survive summary judgment, the Morgans must produce "concrete," or "significant probative evidence" from which a reasonable finder of fact could return a verdict in their favor. *Painter*, 451 S.E.2d at 758. From the record it is clear that the Morgans fail to meet this standard. If disagreement with one's adversary, or with a court's unfavorable decision were sufficient to raise a genuine issue of material fact, Rule 56 of the Rules of Civil Procedure would be rendered a dead letter.

Because the Morgans' disagreements with the Circuit Court's findings are based solely on adversarial re-characterizations of the issues, there is no reason for this Court to disturb the Circuit Court's holding. Therefore, the Circuit Court Order should be affirmed in all respects.

PRAYER FOR RELIEF

To prevail on their claim for reformation of the price term contained in the Agreement and subsequent deed of conveyance, the Morgans must be able to prove by clear and convincing evidence the existence of a mistake on their part, and fraud or inequitable conduct by Terra Firma. There are no issues of material fact with respect to the existence of a unilateral mistake by the Morgans, as the simple mistake or ignorance of fact at issue does not rise to the level of mistake contemplated by *Lusher*. There are no issues of material fact with respect to the existence of fraud, misrepresentation, or inequitable conduct by Terra Firma, as the Morgans have failed to produce evidence sufficient to allow a reasonable jury to find the elements of *Kidd* satisfied and return a verdict in their favor. For these reasons, as more fully explained above, Terra Firma respectfully requests that the Circuit Court 's decision be upheld and the request for remand be denied.

TERRA FIRMA COMPANY,

BY COUNSEL

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CERTIFICATE OF SERVICE

I, Robert W. Dinsmore, hereby certify that on June 4, 2008, I served a true and exact copy of the foregoing Appellees' Brief, by placing a copy in the United State Mail, postage pre-paid, addressed to the Appellants' Counsel at the following address:

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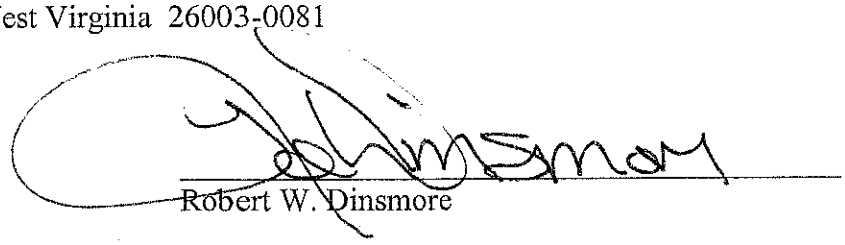

Robert W. Dinsmore